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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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NO. PD-1100-17

IN THE TEXAS COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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THE STATE OF TEXAS
Petitioner
v.
CYNTHIA WOOD
Respondent

No. 01-16-00179-CR
In the First District Court of Appeals

No. 1445251
In the 351st District Court of Harris County, Texas
Hon. Mark Kent Ellis, Judge Presiding

RESPONDENT'S MOTION FOR REHEARING

ORAL ARGUMENT REQUESTED

ALEXANDER BUNIN
Chief Public Defender
Harris County, Texas

TED WOOD
Assistant Public Defender
Harris County, Texas
State Bar of Texas No. 21907800
1201 Franklin, 13th Floor
Houston, Texas 77002
Phone: (713) 274-6705
Fax: (713) 368-9278
ted.wood@pdo.hctx.net

Counsel for Respondent

REQUEST FOR ORAL ARGUMENT

Oral argument may be helpful to this Court in evaluating the meaning and import of Section 15.01(b) of the Texas Penal Code. A clear statement from this Court about Section 15.01(b) would provide valuable guidance to both the bench and the bar. Cynthia Wood respectfully requests oral argument if this Court should grant her motion for rehearing.[1]

[1] *See* Tex. R. App. 79.4 ("If the Court grants rehearing, the case will be set for submission. Oral argument may, but normally will not, be permitted.").

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INTRODUCTION

Cynthia Wood respectfully files this motion for rehearing as permitted by the Texas Rules of Appellate Procedure.[2] Ms. Wood asks for a rehearing on the issue addressed in the Court's Opinion published on September 19, 2018.[3]

Rehearing is warranted because the Opinion did not address Cynthia Wood's main argument. Ms. Wood asserted that a statutory exception exists to the well-established rule on which the Opinion is based. This argument consumed a significant portion of Ms. Wood's brief and warrants discussion and analysis.

Ms. Wood's explanation of why the argument should have been addressed is set out on the following pages. This explanation comprises the "grounds and arguments relied on for rehearing" in this Court as required by the Rules of Appellate Procedure[4]

[2] Tex. R. App. P. 79.1.
[3] *Wood v. State,* No. PD-1100-17, 2018 WL 4472681 (Tex. Crim. App. Sep. 18, 2018). The Court's Opinion (hereinafter Opinion) is attached to this motion as an appendix.
[4] *See* Tex. R. App. P. 79.2(a).

ARGUMENT

The Court's Opinion reflects considerable effort to get this case right. But the Opinion overlooks Cynthia Wood's argument that there is an exception to the well-established rule upon which the Opinion relies. A rehearing is merited so that Ms. Wood's professed exception to the rule may be addressed.

I. The Opinion is based on a well-established rule.

The Opinion is clear and direct. It gets straight to the point. The very first sentence of the "Analysis" portion of the Opinion says:

> The key to our analysis in this opinion is the well-established rule that an indictment charging criminal attempt is not fundamentally defective for failure to allege the constituent elements of the offense attempted.[5]

II. Ms. Wood acknowledged the existence of the well-established rule.

Ms. Wood readily acknowledged the well-established rule in her brief:

> Cynthia recognizes that an indictment for criminal attempt is not fundamentally defective for failure to allege the constituent elements of the offense attempted.[6]

III. However, Ms. Wood argued there is an exception to the well-established rule.

While Ms. Wood recognized the well-established rule upon which the Opinion relies, she argued that there is an exception to the rule:

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[5] Opinion at *2 (page numbers cited are the numbers in the Westlaw version of the Opinion).
[6] Brief for Respondent at 57.

> Indeed, an indictment for criminal attempt is not fundamentally defective for not alleging the elements of the offense attempted. But this is not to say that when a person attempts an aggravated offense, the indictment need not allege the aggravating element. Subsection (b) of Section 15.01 of the Penal Code basically says that the aggravating element must be alleged.[7]

IV. Ms. Wood's professed exception to the well-established rule springs from a statute – Section 15.01(b) of the Penal Code.

As noted in the final sentence of the excerpt from Ms. Wood's brief above, Ms. Wood based her professed exception on a statute. That statute – Penal Code, Section 15.01(b) – is a part of Section 15.01 which is entitled "Criminal Attempt." Subsections (a) and (b) of Section 15.01 are set out below:

> (a) A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.
>
> (b) If a person attempts an offense that may be aggravated, his conduct constitutes an attempt to commit the aggravated offense if an element that aggravates the offense accompanies the attempt.

V. Ms. Wood discussed Section 15.01(b) at length in her brief.

Ms. Wood discussed Section 15.01(b) over the course of seven pages in her brief.[8] Much of the discussion explained how this Court's opinion in *Whitlow v. State,*[9] supported her argument that an exception to the well-established rule existed.[10]

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[7] Brief for Respondent at 55.
[8] Brief for Respondent at 52-58.
[9] *Whitlow v. State,* 609 S.W.2d 808 (Tex. Crim. App. [Panel Op.] 1980).
[10] *See* Brief for Respondent at 55-56.

VI. The Opinion did not address Ms. Wood's argument and thus did not address Section 15.01(b).

The Opinion, as currently drafted, overlooks Ms. Wood's argument. To be sure, the Opinion quotes both subsection (a) and subsection (b) of Section 15.01 at the Opinion's inception.[11] But Subsection (b) – the statute on which Ms. Wood's argument that there is an exception to the well-established rule is based – is never mentioned again.

Similarly, the Opinion does not address Ms. Wood's contention that the *Whitlow* case supports her argument that an exception exists. This is so even though *Whitlow* seems to be the precedent on which the Opinion chiefly relies.[12]

VII. The State agreed with Ms. Wood that there is an exception to the well-established rule.

As mentioned in Part IV above, Ms. Wood's position that there is an exception to the well-established rule is based on Section on 15.01(b) of the Penal Code. While the Opinion did not discuss this statute, the State did. In its brief, the State said:

> Section 15.01(b) provides that "[i]f a person attempts an offense that may be aggravated, his conduct constitutes an attempt to commit the aggravated offense if an element that aggravates the offense accompanies the attempt." Tex. Penal Code § 15.01(b) (West 2012). Section 15.01(b) did not apply to this case because capital murder is not an "aggravated offense" under the Penal Code.[13]

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[11] Opinion at *2.

[12] *See* Opinion at *3 (Opinion explained that the Court's holding was "based on our precedent discussed below" and then immediately discussed *Whitlow*).

[13] State's Brief at 13 (brackets and quotation marks in original).

Ms. Wood quoted this language from the State's brief in her brief.[14] This language shows that the State recognized an exception to the well-established rule. As explained in Part III above, the exception is that when a person attempts an aggravated offense, the indictment must allege the aggravating element. Subsection (b) of Section 15.01 of the Penal Code basically says so. The State did not disagree. Rather, the State said Section 15.01(b) did not apply to the current case because capital murder is not an aggravated offense.[15] The State reasoned that only offenses with the word "aggravated" in their title are aggravated offenses.[16]

In response to the State's claim that Section 15.01(b) was inapplicable, Ms. Wood spent the next 16 pages of her brief refuting that claim.[17] In fact, Ms. Wood detailed seven separate examples of aggravated offenses without the word "aggravated" in their title.[18] The State never filed a reply brief responding to Ms. Wood's refutation of the State's claim.

But the key point here is that the Opinion did not address Ms. Wood's argument that an exception exists to the well-established rule. This was the case even though the State agreed that there was such an exception. The only disagreement between Ms.

[14] Brief for Respondent at 59.
[15] State's Brief at 13.
[16] State's Brief at 13.
[17] Brief for Respondent at 60-75.
[18] *See* Brief for Respondent at 60-75.

Wood and the State concerned the breadth of that exception. The Opinion would be a great help to the bench and bar if it discussed Section 15.01(b).

VIII. A rehearing is warranted so that Ms. Wood's argument can be addressed.

As established above, the Opinion did not address Ms. Wood's argument that there is an exception to the well-established rule. This is disappointing because Ms. Wood's argument about the exception was her main issue. And this Court has made it clear that appellate courts ought to address a party's main issue:

> As a general proposition, reviewing courts ought to mention a party's number one argument and explain why it does not have the persuasive force that the party thinks it does. The party may be dissatisfied with the decision, but at least he will know the reason he was unsuccessful. This practice maintains the integrity of the system and improves appellate practice. [19]

Because the Opinion did not address Ms. Wood's main argument, a rehearing is warranted. And upon rehearing, this Court should address Ms. Wood's argument.

[19] *Sims v. State,* 99 S.W.3d 600, 603 (Tex. Crim. App. 2007).

PRAYER

Cynthia Wood respectfully prays that this Court grant her motion for rehearing. Ms. Wood also prays that this Court grant her request for oral argument. Assuming that a rehearing is granted, Ms. Wood prays that this Court affirm the decision of the First Court of Appeals.

Respectfully submitted,

ALEXANDER BUNIN
Chief Public Defender
Harris County Texas

/s/ Ted Wood
TED WOOD
Assistant Public Defender
Harris County, Texas
State Bar of Texas No. 21907800
1201 Franklin, 13th Floor
Houston Texas 77002
Phone: (713) 274-6705
Fax: (713) 368-9278
ted.wood@pdo.hctx.net

CERTIFICATE OF SERVICE

I certify that on September 25, 2018, I provided this brief to the Harris County District Attorney via the EFILETEXAS.gov e-filing system.[20] Additionally, I certify that on September 25, 2018, I provided this brief to the State Prosecuting Attorney via the EFILETEXAS.gov e-filing system.[21]

/s/ Ted Wood
TED WOOD
Assistant Public Defender
Attorney for Respondent

[20] This service is required by Texas Rule of Appellate Procedure 9.5.
[21] This service is required by Texas Rules of Appellate Procedure 68.11 and 79.7.

CERTIFICATE OF COMPLIANCE

As required by the Texas Rules of Appellate Procedure, I certify that this motion contains 1,375 words.[22] This word-count is calculated by the Microsoft Word program used to prepare this motion. The word-count does not include those portions of the motion exempted from the word-count requirement.[23] Nor does the word-count include the attached appendix. The number of words permitted for this type of computer-generated motion (a motion for rehearing in an appellate court) is 4,500.[24]

/s/ Ted Wood
TED WOOD
Assistant Public Defender
Attorney for Appellant

[22] Tex. R. App. P. 9.4(i)(3).
[23] *See* Tex. R. App. P. 9.4(i)(1).
[24] *See* Tex. R. App. P. 9.4(i)(2)(D).

APPENDIX

Wood v. State, No. PD-1100-17, 2018 WL 4472681 (Tex. Crim. App. Sep. 18, 2018)

2018 WL 4472681
Only the Westlaw citation is currently available.

Court of Criminal Appeals of Texas.

Cynthia Kaye WOOD, Appellant
v.
The STATE of Texas

NO. PD-1100-17
|
DELIVERED: September 19, 2018

Synopsis
Background: Defendant was convicted on guilty plea in the 351st District Court, Harris County, of attempted capital murder and was sentenced to life imprisonment. Defendant appealed. On rehearing, the Houston Court of Appeals, First District, 2017 WL 4127835, reversed conviction and remanded with instructions to enter judgment of conviction for attempted murder, and for resentencing. State petitioned for discretionary review.

[Holding:] The Court of Criminal Appeals, Richardson, J., held that life sentence was not illegal due to State's failure to allege in indictment aggravating factor that elevated crime of murder to capital murder.

Judgment of Court of Appeals reversed; remanded.

West Headnotes (5)

[1] **Criminal Law** Presentation of questions in general

Preservation of error is a systemic requirement that must be reviewed by the appellate court, regardless of whether the issue is raised by the parties.

Cases that cite this headnote

[2] **Criminal Law** Requisites and Proceedings for Entry
Homicide Attempt
Homicide Murder

Indictment charging defendant with attempted capital murder was not fundamentally defective for failure to allege aggravating fact that elevated murder to capital murder, namely, that victim was under age ten, and thus, defendant entered guilty plea to attempted capital murder, as alleged in indictment, and not attempted murder, such that life sentence imposed, which fell within punishment range for attempted capital murder, was not illegal. Tex. Penal Code Ann. §§ 15.01, 19.02(b)(1), 19.03(a)(8).

Cases that cite this headnote

[3] **Sentencing and Punishment** Effect of Statute or Regulatory Provision

A sentence that is outside the maximum or minimum range of punishment is unauthorized by law and is therefore illegal.

Cases that cite this headnote

[4] **Criminal Law** Issues, proof, and variance

Fundamental error exists when a jury charge authorizes a conviction for an offense not found in the indictment.

Cases that cite this headnote

[5] **Indictment and Information** Elements and incidents of offense in general
Indictment and Information Attempts

An indictment charging a consummated offense must properly charge all of the elements of that offense, but an indictment charging an attempted offense is not fundamentally defective for failure to allege the constituent elements of the offense attempted. Tex. Penal Code Ann. § 15.01.

Cases that cite this headnote

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FIRST COURT OF APPEALS, HARRIS COUNTY

Attorneys and Law Firms

Eric Kugler, for The State of Texas.

Theodore Lee Wood, Austin, for Cynthia Kaye Wood.

OPINION

Richardson, J., delivered the opinion for a unanimous Court.

***1** Appellant, Cynthia Kaye Wood, was indicted for the offense of attempted capital murder. She entered into an open plea of guilty. Following the completion of a pre-sentence investigation report, the trial court conducted a sentencing

hearing. At the conclusion of the hearing, the trial court sentenced Appellant to life imprisonment. Appellant appealed her conviction and sentence, alleging five points of error. Finding Appellant's life sentence to be an illegal sentence, the court of appeals reversed Appellant's conviction for attempted capital murder and ordered the trial court to adjudge Appellant guilty of attempted murder.[1] The case was remanded to the trial court to hold a new sentencing hearing. The State petitioned this Court to review the decision of the court of appeals. We hold that Appellant's sentence is not an illegal sentence. We reverse the judgment of the court of appeals and remand the case to the court of appeals to address Appellant's remaining points of error.

FACTUAL BACKGROUND

Appellant gave birth prematurely to a baby boy named K.W. on May 10, 2014. The baby spent the first three months of his life in the hospital. Two days after being released to go home, K.W. was brought back to the hospital because he had stopped breathing, and he remained at the hospital for another five days. On September 19, 2014, after vomiting, K.W. was brought back to the hospital and he underwent surgery. K.W. was readmitted to the hospital—the intensive care unit—on September 30, 2014, because Appellant claimed that he was not breathing and did not have a pulse. Medical personnel conducted several tests to determine what was wrong with K.W., but they could not find anything wrong with him, and the baby's repeated hospitalizations appeared to be out of proportion to his healthy appearance. Appellant requested that a gastrostomy tube (a "G-tube") be inserted so that K.W. would get food directly to his stomach, but no medical reason could be found to support the insertion of a G-tube. During the two days in the intermediate care unit of the hospital—October 8 and 9, 2014—K.W. did very well. Appellant was not there at that time, but K.W.'s grandmother was with him.

When Appellant visited K.W. on October 10, 2014, he had another lack-of-breathing episode. K.W. was put in a new room, and the medical staff placed a hidden camera in the room to observe. On October 11, 2014, Appellant was seen placing an oxygen bag (that was not hooked up to oxygen) over K.W.'s face. The next day, the video recording captured Appellant attempting to suffocate K.W. on two separate occasions. She first pulled a blanket up over K.W.'s face, then she put her hand over his face, setting off his oxygen monitors both times. He was thereafter transferred to the intensive care unit. When K.W. recovered, he was separated from his mother and sent to a foster home.

THE INDICTMENT

***2** The State charged Appellant with the felony offense of "Attempted Capital Murder." The indictment against her read as follows, in pertinent part:

> [I]n Harris County, Texas, CYNTHIA KAYE WOOD hereafter styled the Defendant, heretofore on or about OCTOBER 12, 2014, did then and there unlawfully intentionally, with the specific intent to commit the offense of CAPITAL MURDER of K.W., hereafter styled the Complainant, do an act, to-wit: USE HER HAND TO IMPEDE THE COMPLAINANT'S ABILITY TO BREATHE, which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended.[2]

THE PERTINENT STATUTES

Murder § 19.02

The offense of "Murder" under Texas Penal Code § 19.02(b)(1) occurs if a person "intentionally or knowingly causes the death of an individual."[3]

Capital Murder § 19.03

The offense of Capital Murder under Texas Penal Code § 19.03(a)(8) occurs if a person "commits murder as defined under Section 19.02(b)(1) and ... the person murders an individual under 10 years of age."[4]

Criminal Attempt § 15.01

An "attempted" offense is one category lower than the offense attempted.[5] Texas Penal Code § 15.01 defined "Criminal Attempt" as follows:

> (a) A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.
> (b) If a person attempts an offense that may be aggravated, his conduct constitutes an attempt to commit the aggravated offense if an element that aggravates the offense accompanies the attempt.[6]

ANALYSIS

[1]The key to our analysis in this opinion is the well-established rule that an indictment charging criminal attempt is not fundamentally defective for failure to allege the constituent elements of the offense attempted.[7] Although Appellant does not allege that the indictment was defective, the basis for her illegal-sentence claim is that, since the indictment omitted one of the elements of capital murder, the indictment alleged only attempted murder, not attempted capital murder, and so she only pled to, and should only be convicted of, attempted murder, not attempted capital murder.[8] The court of appeals agreed with Appellant, finding her life sentence illegal because "[t]he indictment in this case did not authorize a conviction for attempted capital murder."[9] The specific reasoning behind the appellate court's decision can be found in the following excerpt from the lower court's opinion on the motion for rehearing:

> Here, the indictment charged a complete offense—attempted murder. Although the State intended to charge appellant with the offense of attempted capital murder, it did not do so because the aggravating factor was missing from the indictment. *See Crawford v. State*, 632 S.W.2d 800, 801 (Tex. App.—Houston [14th Dist.] 1982, pet. ref'd) (reversing defendant's conviction for capital murder where indictment did not allege "aggravated rape" as enhancing offense under Penal Code section 19.03(a)(2) elevating murder to capital murder). The term "capital murder" is a term that describes a sentencing regime rather than a criminal offense. There is no crime of capital murder that is different from murder. Capital murder is murder. But, it is murder that is accompanied by an aggravating factor that provides the State with a greater range of punishment than that which applies to the offense of murder. The requirement that the indictment allege the aggravating factor under section 19.03(a)(2) is particularly

> important given that the statute lists nine possible aggravating circumstances elevating the offense of murder to capital murder. The indictment in this case did not authorize a conviction for attempted capital murder, and the State is held to the offense charged in the indictment. *See Sierra* [*v. State*], 501 S.W.3d [179], 183 [(Tex. App.—Houston [1st Dist.] 2016, no pet.)].[10]

***3** [2]Appellant argues to this Court that the appellate court is correct—that her sentence is illegal because her indictment did not charge, and she did not plead to, the offense of attempted capital murder. Appellant claims that the court of appeals correctly held that the indictment charged, and she pled to, the offense of attempted murder, which made her life sentence illegal because it fell outside the permissible punishment range for attempted murder.

[3]It is true that "[a] sentence that is outside the maximum or minimum range of punishment is unauthorized by law and is therefore illegal."[11] However, based on our precedent discussed below, we hold that Appellant was charged with, pled to, and was properly sentenced for, the offense of attempted capital murder.

In *Whitlow v. State*,[12] the appellant was convicted of the offense of attempted escape with a deadly weapon. No motion to quash was filed, but the appellant contended on appeal that the indictment was fundamentally defective for failing to include each of the elements of the offense of escape. The indictment in *Whitlow* charged the appellant "with the specific attempt to commit the offense of escape," by "attempt[ing] to escape from the custody of the Falls County Sheriff by the use of a deadly weapon," and "said attempt amount[ed] to more than mere preparation that tend[ed] but fail[ed] to effect the commission of the offense intended."[13] In *Whitlow*, we held that,

> The elements necessary to establish an offense under V.T.C.A., Penal Code, Section 15.01 the attempt statute comprise: 1) a person, 2) with specific intent to commit an offense, 3) does an act amounting to more than mere preparation that 4) tends, but fails, to effect the commission of the offense intended.[14]

We concluded in *Whitlow* that the indictment, which is similar to the one in this case, charged attempted escape with a deadly weapon, and thus it was not fundamentally defective.[15] We cited to our decision in *Williams v. State*,[16] wherein this Court unanimously rejected the contention that an indictment charging an attempted offense is defective for not alleging an essential element of the consummated offense that was alleged to have been attempted.[17] In fact, we made it a point to note in *Whitlow*, that "[i]f this were a conviction for a consummated escape, the contention[—that the indictment failed to include each of the elements of the offense of escape—] would have merit."[18]

In *Jones v. State*,[19] a jury convicted the appellant of attempted murder. The appellant alleged on appeal that his motion to quash should have been granted and that the court's charge was fundamentally defective. Again, we cited to our *Williams* decision, wherein we held that "an indictment for criminal attempt is not fundamentally defective for failure to allege the constituent elements of the offense attempted."[20] We noted in *Jones* that, regarding an attempted offense, "the offense attempted need not be proved as a completed offense."[21]

***4** Although our decisions in *Williams*, *Jones*, and *Whitlow* address allegations that an indictment is fundamentally defective, not that a sentence is illegal, the reasoning of those decisions, and not the cases cited by the court of appeals, nevertheless governs the outcome here. The intermediate appellate court opinions in *Crawford v. State*[22] and *Sierra v. State*,[23] which are the cases cited by the court of appeals to support its holding, are distinguishable because those cases did not involve attempted offenses.

[4]In *Crawford v. State*, the appellant was charged with capital murder, not attempted capital murder. And since the indictment failed to allege one of the elements of the offense of capital murder, the Fourteenth Court of Appeals followed authority from this Court holding that "fundamental error exists when a jury charge authorizes a conviction for an offense not found in the indictment."[24] In this case, the offense of attempted capital murder was found in the indictment. Thus, while the decision in *Crawford* was not incorrect, it does not control the outcome in this case.

In *Sierra v. State*, the appellant pled guilty to burglary of a habitation with intent to commit sexual assault. The trial court classified the offense as a first-degree felony and sentenced the appellant to a 30-year prison term. On appeal, the appellant challenged this as an illegal sentence, arguing that the indictment charged him with burglary of a habitation "by concealment," which is a second degree felony, not a burglary of a habitation "by entry," which is a first degree felony. The First Court of Appeals agreed with the appellant that, because he was only charged with a

second degree felony, he could not be punished for a first degree felony. If an indictment charges a complete offense, the State is held to the offense charged in the indictment.[25] In *Sierra* the indictment charged a completed offense, not an attempted offense. Thus, again, this rule of law in *Sierra* is not incorrect, but under these facts, *Sierra* does not mandate that Appellant's conviction for attempted capital murder be reduced to attempted murder.[26]

[5]An indictment charging a consummated offense must properly charge all of the elements of that offense. But an indictment charging an attempted offense is not fundamentally defective for failure to allege the constituent elements of the offense attempted.[27] We hold, therefore, that the indictment in this case properly charged attempted capital murder. It logically follows, then, that Appellant's agreement to plead to the allegations in the indictment was an agreement to plead to the offense of attempted capital murder. Thus, Appellant's life sentence, which falls within the punishment range for attempted capital murder, is not an illegal sentence.

CONCLUSION

***5** The court of appeals overruled Appellant's first two points of error, but sustained her third point of error alleging that her sentence of life imprisonment is an illegal sentence. The court of appeals did not resolve Appellant's fourth and fifth points of error.[28] Because we hold that Appellant's sentence was not illegal, we reverse the judgment of the court of appeals and remand the case for the court of appeals to address Appellant's remaining two points of error.

All Citations

--- S.W.3d ----, 2018 WL 4472681

Footnotes

1 *Wood v. State*, No. 01-16-00179-CR, 2017 WL 4127835, at *6 (Tex. App.—Houston [1st Dist.] 2017)(mem. op. on reh'g).

2 The indictment was amended to include an allegation of a deadly weapon, to which Appellant pled "true." There is no issue before us involving the deadly weapon allegation.

3 TEX. PENAL CODE § 19.02(b)(1).

4 *Id.* at § 19.03(a)(8).

5 *Id.* at § 15.01(d).

6 *Id.* at § 15.01(a) and (b).

7 *Whitlow v. State*, 609 S.W.2d 808, 809 (Tex. Crim. App. 1980); *Jones v. State*, 576 S.W.2d 393, 395 (Tex. Crim. App. 1979); *Williams v. State*, 544 S.W.2d 428, 430 (Tex. Crim. App. 1976); *Young v. State*, 675 S.W.2d 770, 771 (Tex. Crim. App. 1984).

8 Under Texas Code of Criminal Procedure Article 1.14(b),

> If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other post-conviction proceeding.

TEX. CODE CRIM. PROC. art. 1.14(b). Although the court of appeals failed to address preservation of error, it "is a systemic requirement that must be reviewed by the courts of appeals regardless of whether the issue is raised by the parties." *Haley v. State*, 173 S.W.3d 510, 515 (Tex. Crim. App. 2005); *Ford v. State*, 305 S.W.3d 530, 532-33 (Tex. Crim. App. 2009) ("Preservation of error is a systemic requirement on appeal. ... Ordinarily, a court of appeals should review preservation of error on its own motion[.]"). In this case, however, Appellant did not file a motion to quash nor directly attack the indictment. The third issue raised by Appellant on direct appeal, which was the one sustained by the court of appeals and the reason for the reversal, was worded in Appellant's brief filed with the court of appeals as follows:

> A sentence that is outside the maximum or minimum range of punishment is unauthorized by law and constitutes an illegal

sentence. Here, Cynthia was sentenced to life in prison which is a legal sentence for a first degree felony conviction. But the evidence was sufficient only to support a second degree felony conviction which carries a punishment of two to twenty years in prison. Was Cynthia's sentence illegal?

Appellant's Brief on Direct Appeal at 6, 65, *Wood*, 2017 WL 4127835. But, we note that Appellant's brief on direct appeal pointed to the language in the indictment as the basis for her challenge on appeal. She argued that, "[f]or the reasons set out in Issue Number One and Issue Number Two," the evidence substantiated only the offense of attempted murder—a second degree felony. Appellant's Brief on Direct Appeal at 65, *Wood*, 2017 WL 4127835. Earlier in that brief, Appellant set out the "reasons" that supported her arguments in Issues One and Two. She asserted that the indictment "describes a murder, but does not say anything about an aggravating factor." Appellant's Brief on Direct Appeal at 33. Thus, she said, the indictment failed to properly charge her with attempted capital murder since no aggravating circumstance was found therein. *Id.* According to Appellant, since the aggravating circumstance was missing from the indictment, and the indictment language was used for her judicial confession forming the basis for her plea, she did not judicially confess to committing all the elements of attempted capital murder. *Id.* at 33-34. And, said Appellant, since her judicial confession did not establish every element of the offense of attempted capital murder, her judicial confession does not constitute sufficient evidence to support her plea of guilty to the charge of attempted capital murder. This argument persuaded the court of appeals to sustain Appellant's third point of error, which was that her sentence was illegal.

Nevertheless, Appellant has never characterized this issue as an alleged "defect" in the indictment. Moreover, Appellant does not claim that the indictment fails to properly charge her with any offense at all. Therefore, since Appellant's argument is, instead, that her indictment charges her for an offense that is different from—and carries a lesser punishment than—the offense that she was convicted of and sentenced for, preservation of a "defective-indictment"-claim is not an issue in this case.

9 *Wood*, 2017 WL 4127835, at *5.

10 *Id.*

11 *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003).

12 609 S.W.2d 808 (Tex. Crim. App. 1980).

13 *Id.* at 809.

14 *Id.*

15 *Id.*

16 544 S.W.2d 428 (Tex. Crim. App. 1976).

17 *Whitlow*, 609 S.W.2d at 809 (citing *Williams v. State*, 544 S.W.2d at 430 and *Gonzales v. State*, 517 S.W.2d 785, 787-88 (Tex. Crim. App. 1975)).

18 *Whitlow*, 609 S.W.2d at 809 n.1 (first citing to *Ex parte McCurdy*, 571 S.W.2d 31 (Tex. Crim. App. 1978), and then citing to *Ex parte Abbey*, 574 S.W.2d 104 (Tex. Crim. App. 1978), and noting that, "[t]he charge here was not consummated escape but attempted escape.").

19 576 S.W.2d 393 (Tex. Crim. App. 1979).

20 *Id.* at 395 (citing *Williams*, 544 S.W.2d at 430). *See also Young v. State*, 675 S.W.2d at 771; *Boston v. State*, 642 S.W.2d 799, 802 (Tex. Crim. App. 1982) (holding that an indictment for a criminal attempt need not set out the elements of the offense intended).

21 *Jones*, 576 S.W.2d at 395.

22 632 S.W.2d 800 (Tex. App.—Houston [14th Dist.] 1982, pet. ref'd).

23 501 S.W.3d 179 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

24 *Crawford*, 632 S.W.2d at 801 (citing *Ross v. State*, 487 S.W.2d 744 (Tex. Crim. App. 1972)). The *Crawford* opinion also cites to *Brasfield v. State*, 600 S.W.2d 288, 294 (Tex. Crim. App. 1980), "where the Court reversed a conviction for capital murder because the indictment was 'susceptible of an interpretation that the victim of the alleged kidnapping was a person other than the named deceased.' "

25 *Sierra*, 501 S.W.3d at 183.

26 In fact, if we were to follow the logic of *Sierra*, it is difficult to understand how the court of appeals could have concluded that the indictment in this case alleged the offense of attempted murder, any more than it alleged the offense of attempted capital murder, since the indictment did not charge the specific elements of murder that allegedly were attempted—i.e., that Appellant attempted to cause the death of K.W.

27 *Whitlow*, 609 S.W.2d at 809; *Jones*, 576 S.W.2d at 395; *Williams*, 544 S.W.2d at 430; and *Young*, 675 S.W.2d at 771.

28 *Wood*, 2017 WL 4127835 at *6 n.3.

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